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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LIA ISHKHANIAN,

Plaintiff and Appellant,

v.

BMW OF NORTH AMERICA, LLC,  
et al.,

Defendants and Respondents.

B265821

(Los Angeles County  
Super. Ct. No. BC529496)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
William F. Fahey, Judge. Affirmed.

Law Offices of René Korper and René Korper for Plaintiff and  
Appellant.

Lehrman Law Group, Kate S. Lehrman, Robert A. Philipson for  
Defendants and Respondents.

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Plaintiff Lia Ishkhanian (plaintiff) appeals from a judgment entered after a jury found in favor of defendants BMW of North America, LLC (BMW NA) and South Bay BMW (collectively, defendants) in this action alleging breach of express and implied warranty. Plaintiff contends the trial court abused its discretion in excluding expert opinion testimony from the mechanic who repaired her BMW sedan after an accident. The expert opined that a defective part of the suspension failed suddenly, resulting in the accident. The trial court found the mechanic's opinion consisted of speculation and conjecture and therefore excluded the opinion. Finding no error, we affirm.

## **BACKGROUND**

### **The Car Accident**

In September 2012, plaintiff leased a new 2013 BMW 328i sedan from defendant South Bay BMW. Plaintiff remained current on her lease payments. The car came with a four-year/50,000-mile warranty from defendant BMW NA. On January 21, 2013, Angel Ishkhanian (plaintiff's mother) was driving plaintiff's BMW, when she hit a parked car. The BMW had 2,197 miles on it.

At trial, plaintiff's mother, who was alone in the car at the time of the accident, gave the following account of the incident. Between 4:00 and 4:30 p.m. on January 21, 2013, she was stopped at a red light at the intersection of Pacific Coast Highway and 5th Street in Hermosa Beach. When the light turned green, she made a left turn from Pacific Coast Highway onto 5th Street. As she proceeded west on 5th Street, she heard a "very loud sound" and then the BMW came to a stop on its own. She did not observe or feel any bumps or dips on the road. She did not lose control of the car or struggle to steer it. When she exited the car, she noticed that the BMW had hit a Honda

Odyssey parked on 5th Street, to the right of the BMW. She had not felt the impact of the two vehicles colliding.

On January 23, 2013, plaintiff brought her car to South Bay BMW for repair. Plaintiff related to the dealership what her mother had told her about the accident. BMW NA arranged for an inspection of the car to determine if the repair was covered under the car's warranty. Plaintiff obtained a rental car and South Bay BMW paid for it.

In May 2013, BMW NA contacted plaintiff and informed her the company would not repair her car under warranty. In a letter, dated May 13, 2013, BMW NA explained it had concluded after its inspection that the "wishbone," or lower control arm of the car,<sup>1</sup> fractured as a result of the impact the car sustained during the January 21, 2013 accident, not as a result of a defect. BMW NA suggested plaintiff report the damage to her car insurance company, which she did. BMW NA ceased paying for plaintiff's rental car.

In August 2013, plaintiff had the suspension of her BMW repaired at Continental Motor Cars, a repair shop owned by Frank Cervetto (the witness whose expert opinion testimony the trial court excluded). Plaintiff's insurance company paid the cost of the repair.

## **The Litigation**

### **The complaint**

Plaintiff filed this action in December 2013. In her first cause of action for breach of express warranty and her second cause of action for breach of implied warranty of merchantability, she alleged defendants "failed to make the [BMW] conform to the applicable warranties," and therefore she was

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<sup>1</sup> The lower control arm, part of the car's suspension, is connected to the wheels and the car's frame.

entitled to replacement of the BMW or restitution “in an amount not less than \$46,017.40” under the Song-Beverly Consumer Warranty Act (also known as the California Lemon Law), Civil Code section 1790 et seq.

### **Motions in limine**

Defendants filed motions in limine seeking, among other things, an order excluding accident reconstruction testimony by plaintiff’s expert witnesses on grounds plaintiff’s metallurgist and mechanic were not qualified in accident reconstruction. Defendants also sought to exclude testimony by plaintiff’s mechanic, Frank Cervetto, about his opinion “that a binding sway bar caused the lower control arm [of the BMW] to break.” Defendants argued Cervetto’s testimony would be speculative because he failed to support his opinion with testing, “detailed inspection data,” or “calculations and quantitative analysis” showing that a sway bar<sup>2</sup> that was improperly binding or frozen in place could cause the lower control arm of the BMW to break. The trial court denied the motions in limine “without prejudice to proper trial objections.”

### **Expert testimony by metallurgical engineers**

Trial commenced. After plaintiff testified in her case-in-chief, defendants called (out of order) their expert metallurgical engineer, David Coates, who specialized in failure analysis (examining why metal components fail). Coates inspected the lower control arm of plaintiff’s BMW both visually and using a scanning electron microscope “at very high magnification.” His inspections revealed no deficiencies or defects in the component, which was made from aluminum alloy. Coates did not observe “an ongoing fracture,” which would indicate metal fatigue. In his visual inspection, he observed a

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<sup>2</sup> When a car is turning, a sway bar helps stabilize the car by preventing it from leaning.

“mat surface” or “roughened surface of the fracture,” indicative of “a bending overload failure.” Using the scanning electron microscope, he observed “lots and lots of little dimples” on the fractured surface, again indicating an overload failure and not a fatigue failure. Coates opined that “enough force was put on, compression from either end, to cause [the lower control arm] to buckle and bend,” and “ultimately it broke.” Coates concluded that, when the lighter BMW struck the heavier Honda Odyssey, the force of the impact caused compression on the lower control arm, which then bent and broke. Coates disagreed with plaintiff’s theory that a binding or frozen sway bar caused the lower control arm to break. Coates explained that the sway bar was not connected to the lower control arm. Coates testified that, to the extent the sway bar was frozen and not free to rotate, it might cause a strut to fail, but not the lower control arm.

Following Coates’s testimony, plaintiff called her own metallurgical engineer, Michael Neff, as an expert witness. Like Coates, Neff specialized in failure analysis. Neff indicated he found no deficiencies in the lower control arm. He conducted a hardness test, comparing the metal in the broken control arm to the metal in an exemplar control arm, and ruled out the possibility of a manufacturing defect. He agreed with Coates that an overload failure caused the lower control arm to break. He testified that the control arm “bent to approximately 95 degrees and then broke in an overload fashion.” Unlike Coates, however, Neff concluded the control arm broke just prior to the accident and not upon impact. Neff explained that, if the accident had caused the break, he would expect to “see a mark on the tire or the rim corresponding to that inward force on the lower portion of the wheel.” In reviewing photographs of the BMW, he did not observe any such marks. He testified that “an impact in the wheel” could “put a force on the

suspension components,” but “it has to be significant” because “suspensions are built to take some abuse.” In reviewing photographs of the Honda Odyssey, he noted only “a very superficial, glancing impact to” that vehicle, and not evidence of an “impact causing a directed force” sufficient to fracture the BMW’s lower control arm. Neff testified that a “glancing” impact to the bodies of the two vehicles, such as he observed in this case, would not “affect the suspension components” of the BMW.

When plaintiff’s counsel asked Neff if he knew why the lower control arm fractured, he responded: “Well, when I first did my investigation, I saw that it was an overload, and there had to be a force associated with that. And then later I learned from our mechanic, who we’ll hear from later in this trial [Frank Cervetto], that the sway bar was frozen, and that would explain the fracture of the lower control arm.” On cross-examination, he acknowledged the lower control arm is not directly connected to the sway bar or the sway bar link that affixes the sway bar to the strut. In describing the function of the sway bar and sway bar link, Neff testified: “[A]s one wheel comes up and compresses the shock [or strut] -- let’s say the left wheel is moving up. It will, in turn, transmit that upward force on the sway bar. And then the sway bar link will, through the end of this sway bar connection, compensate for that in the right wheel.” Neff further explained that when a car is turning or encounters a bump or irregularity in the road’s surface (e.g., a dip), the sway bar and sway bar link work to “keep[] both wheels on the road.” When a car is driving straight over an even surface, the sway bar and sway bar link serve no purpose. Neff stated that, as he understood the incident, plaintiff’s mother made a left turn over a “drain gully” and then drove “slightly uphill onto 5th Street.” Neff testified that, during the left turn, dip, and subsequent drive uphill, if the BMW’s sway bar was frozen, there would be “an inward

load on the lower control arm.” Neff conceded he had no expertise in automobile accident reconstruction.

**Evidence Code section 402 hearing regarding Cervetto’s expert opinions**

After plaintiff’s mother testified about the accident (as summarized above), plaintiff’s counsel informed the trial court that Cervetto was plaintiff’s next witness. The court inquired about the scope of Cervetto’s testimony and expressed concern that he might testify beyond his area of expertise. The court commented that Neff went “way beyond his expertise” as a metallurgical engineer, testifying about accident reconstruction (without objection by defendants). The court decided to hold an Evidence Code section 402<sup>3</sup> hearing “to preview” Cervetto’s opinions and determine their admissibility.

Cervetto testified he had been an automotive technician since 1978 and had owned his own shop since 1990. He specialized in the repair of European cars. He had worked on “thousands” of suspensions and was “aware of how suspensions operate in conjunction with sway bars.” He had built suspensions on stock cars. He had worked on the suspension of one 2013 BMW 328i (the year, make and model of plaintiff’s car), and the suspensions of “hundreds” of older model 328i’s.

Cervetto based his opinions on his understanding that plaintiff’s mother “was making a left-hand turn going up a street. She hit a dip, and then as she came off the dip, she heard a noise. The car veered to the right, and she tapped another vehicle.”<sup>4</sup>

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<sup>3</sup> Further statutory references are to the Evidence Code.

<sup>4</sup> As set forth above, plaintiff’s mother testified at trial that she did not observe or feel any bumps or dips on the road during this incident.

During the first inspection of plaintiff's BMW, Cervetto observed that the lower control arm was broken. He questioned whether it was a metal fatigue failure, given that there appeared to be no damage to the tire or rim, only "some . . . bumper damage." During the third inspection, he observed that the sway bar links were bent and "began to feel the suspension was binding." He disconnected the sway bar and found he "could barely move it."

Cervetto testified to the following opinion about why the BMW's lower control arm broke: "When you go into the turn, the right front suspension gets loaded, which puts a load on the lower control arm. So the more it wants to go up, the more load goes into the control arm. [¶] As she continues making the turn, when she hit the dip, the suspension couldn't move anymore, so the suspension tried to push in as hard as it could on the lower control arm, and essentially it couldn't go, so it broke upward and, then, obviously, came down to the side. [¶] . . . [¶] So, at that point, the sway bar, or stabilizer bar, it's supposed to move with the suspension. It's acting as a suspension, like a coil spring. So once it came up and stopped, there's a point where the lower control arm is not as strong as the sway bar. Can't take all that weight. But you're downloading all that weight to the right front tire, and that's where the problem occurs, because now you're transferring 3400 pounds to that right front, and that lower control arm being manufactured in that style, you know, couldn't take that much weight, and it broke." According to Cervetto, sway bars are "supposed to move freely" and not "inhibit the suspension movement of the vehicle." On cross-examination, Cervetto conceded he did not have training or expertise in failure analysis regarding automotive components.

Cervetto stated he received his information about how the accident occurred from plaintiff's counsel. He did not know how fast plaintiff's mother



was driving or whether she was stopped at a red light before making the left turn. He assumed her speed was 15 to 20 miles per hour. Plaintiff's counsel drove Cervetto by the accident scene and Cervetto observed a dip in the road. Cervetto was not sure what city he was in or what street he was on or what direction he was travelling when he drove by the accident scene.

Cervetto did not test his theory on an exemplar BMW by binding the sway bar and driving it under the same conditions as plaintiff's mother to determine if the lower control arm would break. He stated it would be "too dangerous to freeze up a sway bar and drive it like that." He conducted a visual inspection of another 2013 BMW 328i and observed "how much freedom was in the sway bar" when he moved it by hand. It moved "[q]uite easily," as opposed to the sway bar on plaintiff's BMW, which "would not move" when Cervetto attempted to move it by hand.

Cervetto testified he was unaware of any similar lower control arm failure on a BMW 328i. He stated he had seen a failure on a 1990 or 1991 BMW M30 where the driver "hit a dip, and the ball joint pulled out of the steering knuckle." The wishbone broke at the ends, not in the middle like the lower control arm on plaintiff's BMW. Cervetto conceded he had "never seen on any [other] automobile a sway bar freeze causing a control arm to snap."

At the conclusion of Cervetto's testimony at the 402 hearing, defendants moved to exclude Cervetto's opinion regarding the cause of the lower control arm failure. Defendants argued Cervetto did not "have any failure-analysis background" and "didn't do any failure-analysis testing to prove out this so-called theory about how the control arm broke." They also argued his opinion was "based on speculation" in that he didn't "know basic information about the incident." The trial court heard oral argument and invited the parties to submit further briefing.

After reviewing the parties' briefing, and hearing further oral argument, the trial court granted defendants' motion to exclude Cervetto's opinion testimony. The court stated, in pertinent part: "In this case, Cervetto is not a mechanical engineer or a failure-analysis expert. He's never testified before as an expert. He's worked on one 2013 BMW 328i. His proffered opinion was rambling and unintelligible and would not assist the jury. He had never before conducted the type of tests which consists simply of pulling on the sway bar -- and that's shown at his deposition testimony, page 125, that he conducted in this case, the Ishkhanian case.<sup>[5]</sup>"

"Cervetto provided no testimony such that a test has ever been used by any other auto mechanic or expert in the field, or is a test that is established, or approved, by the literature regarding suspensions, and, more particularly, broken control arms, whether in BMWs or, for that matter, in any other car. So the court concludes that his testimony is not of the type that an expert can reasonably rely upon.

"Cervetto has never seen a BMW sway bar act as he's attempting to describe it in this case. And, in fact, he testified in his deposition that he contacted two other experienced mechanics, and they admitted that they had no experience with faulty BMW sway bars, either. So there's no data that is offered by Cervetto to support his conclusions. No data from his peers, no data from scientifically-sound testing, and certainly no data available from any literature that has been proffered here to support his proffered testimony.

"Ultimately, the court concludes that his testimony is speculative and conjecture and, really, just a request to trust him because that's his opinion,

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<sup>5</sup> At the start of the 402 hearing, plaintiff's counsel lodged with the trial court the transcript of Cervetto's deposition.

and I don't find that to be sufficient. And, therefore, the defense motion to exclude Cervetto's opinion testimony is granted."

The trial court permitted plaintiff to call Cervetto as a percipient witness. Prior to the 402 hearing, plaintiff's counsel represented Cervetto had percipient knowledge regarding his observations of the accident scene and his observations of the damage to the BMW. Plaintiff declined to call Cervetto as a percipient witness and rested her case.

### **Testimony by remaining defense witnesses**

Rebecca Phillips, the owner of the Honda Odyssey, testified about the incident at trial for the defense. Shortly before 4:00 p.m. on January 21, 2013, she drove to the gym, as she did five days a week. She made a left turn from Pacific Coast Highway onto 5th Street. She parked her Honda Odyssey on 5th Street, facing west, on a decline toward the ocean, about 100 meters from the intersection. She did not recall any bump or dip on the road.

When the accident occurred, about 4:15 p.m., Phillips was participating in an outdoor workout at the gym, about 100 meters away from her car. She did not see the accident, but heard the sound of vehicles colliding. She did not hear any "loud metal popping sound, or banging sound" before she heard the impact of vehicles. She walked to her minivan and discovered it was involved in the accident. Given how loud the crash had sounded, she was surprised to see what appeared to be only minor damage to her vehicle.

Phillips approached plaintiff's mother and asked if she was okay. According to Phillips, plaintiff's mother confirmed she was fine, then apologized to Phillips, explaining, "The sun was in my eyes." This explanation made sense to Phillips because she noticed the sun was starting to set, causing a glare off the ocean and "visibility issues." Plaintiff's mother

did not tell Phillips there was something wrong with the BMW that had caused the accident.

Phillips offered to drive plaintiff's mother around the corner to her (plaintiff's mother's) husband's car repair shop so she could retrieve the car insurance information. As Phillips drove, she noticed her minivan was not functioning properly. "[T]he steering was not responding." She could turn the vehicle to the right, but not to the left. She heard "a grinding noise" that sounded like "metal on metal." Her vehicle had not had any steering issues before the incident. Believing the vehicle was not safe to drive home, Phillips parked it outside the gym and had it towed to the dealership for repairs.

Defendants also called Bill Embree, an after-sales (service and parts) area manager for BMW NA, who testified that plaintiff's warranty did not cover losses resulting from car accidents. BMW NA advised customers who were involved in accidents to contact their insurance companies regarding payment for repairs. Michael McCaffrey, a technical support engineer for BMW NA, inspected plaintiff's BMW in March 2013 and testified about his inspection at trial. Going into the inspection, McCaffrey understood that plaintiff was alleging a defect in the "suspension caused an accident at 10 to 15 miles per hour." Based on his inspection, McCaffrey determined the impact of the accident, not a defect, caused the lower control arm of the BMW to bend until "it snapped."

Defendants' final witness was Roger Brown, a lead engineer for BMW NA, who testified as defendants' expert in accident reconstruction. Prior to his testimony in this case, he had "provided accident reconstruction consulting or opinion work on" 200 to 300 cases, and had testified as an accident reconstruction expert on approximately 20 occasions. Shortly before trial, Brown inspected plaintiff's BMW and the broken lower control arm that

had been removed from the BMW. He also viewed photographs of the BMW taken after the accident, including photographs of “the tension strut and the stabilizer bar link.” He reviewed transcripts of the depositions of plaintiff, her mother, Rebecca Phillips, and the metallurgists (Coates and Neff), and drafts of the trial testimony of plaintiff and her mother. He visited the accident scene, where he took measurements and inspected the geography of the area. He did not observe any dips, bumps or potholes in the road.

Brown concluded the lower control arm of plaintiff’s BMW was not defective and did not fracture before the accident. Instead, he determined the lower control arm fractured upon impact when the right front tire of the BMW struck the left rear tire of the Honda Odyssey, tread to tread. Brown testified that “the force that caused the high compression in the lower control arm was primarily from a fore-and-aft force onto the tire.”

### **Special verdicts**

In the special verdict on express warranty, the jury found plaintiff’s BMW did not contain a defect in workmanship or material covered by the warranty that substantially impaired the vehicle’s use, value or safety to a reasonable person in plaintiff’s situation. In the special verdict on implied warranty of merchantability, the jury found plaintiff’s BMW was fit for the ordinary purposes for which vehicles are used. The trial court entered judgment in accordance with the special verdicts.

### **DISCUSSION**

Plaintiff contends the trial court abused its discretion in excluding expert opinion testimony from Frank Cervetto, the mechanic who repaired the BMW’s suspension after the accident. The court found Cervetto’s testimony that a binding or frozen sway bar caused the BMW’s lower control arm to break was based on speculation and conjecture. For the reasons

explained below, we conclude the court acted within its discretion in excluding Cervetto's opinions.

Under section 801, "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

Under section 802, "A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

"Thus, under Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 771-772 (*Sargon*).)

“The trial court’s preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness. The court must not weigh an opinion’s probative value or substitute its own opinion for the expert’s opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. Rather, it conducts a ‘circumscribed inquiry’ to ‘determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert’s general theory or technique is valid.’ [Citation.] The goal of trial court gatekeeping is simply to exclude ‘clearly invalid and unreliable’ expert opinion. [Citation.] In short, the gatekeeper’s role ‘is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.’” (*Sargon, supra*, 55 Cal.4th at p. 772.)

We review the trial court’s decision to exclude expert testimony for abuse of discretion. (*Sargon, supra*, 55 Cal.4th at p. 773.) “A ruling that constitutes an abuse of discretion has been described as one that is ‘so irrational or arbitrary that no reasonable person could agree with it.’” (*Ibid.*) “The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.” (*Ibid.*)

The trial court did not abuse its discretion in declining to allow Cervetto to testify as an expert. Plaintiff sought to present Cervetto’s expert testimony to support her theory of the case that a defect in her 2013 BMW

328i—a binding or frozen sway bar—caused the lower control arm of the BMW to break. Other than plaintiff’s car, Cervetto had worked on the suspension of one 2013 BMW 328i. In connection with his work on this case, he inspected an exemplar 2013 BMW 328i and found that when he attempted to move the sway bar by hand it moved easily, unlike the sway bar on plaintiff’s car which he could not move by hand. Cervetto did not mention any other auto mechanic or expert who had used this type of hand test to determine if a sway bar was binding or frozen. In fact, he apparently had not consulted with a mechanic who had any experience with faulty sway bars at all. Cervetto had not heard about any other case involving any type of vehicle in which a binding or frozen sway bar caused a lower control arm to snap. Cervetto was not a mechanical engineer or failure analysis expert. He had never testified as an expert.

Cervetto did not base his opinions on matter “of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.” (§ 801, subd. (b).) For example, he did not rely on personal experience with binding or frozen sway bars, or other mechanics’ experiences with faulty sway bars, or studies regarding faulty sway bars. Instead, he relied on his personal belief that in this one, particular case, a sway bar he could not move with his hand caused the lower control arm to fail. He had no other data supporting his opinions. His personal belief amounted to conjecture, not a reasonable basis for expert opinion. (*Sargon, supra*, 55 Cal.4th at p. 772.)

Plaintiff argues the trial court should have allowed Cervetto to present expert opinion testimony on issues not related to a defect in the sway bar. In her appellate reply brief, she represents that Cervetto “would have testified that the impact between [plaintiff]’s vehicle and the parked van was too



minor to have broken the control arm, based upon Cervetto's personal examination of [plaintiff's] vehicle and review of photographs of repair records of the van." After the trial court made its ruling at the 402 hearing, plaintiff rested. She did not inform the court there were other opinions she wanted Cervetto to present. The court did not abuse its discretion in excluding Cervetto's opinion testimony as that testimony was presented to the court at the 402 hearing.

### **DISPOSITION**

The judgment is affirmed. Defendants are entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.